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NOTE FOR THE ATTENTION OF TRADE UNIONS AND STAFF ASSOCIATIONS

Subject: DPO recommendations and EDPS advice on the use of FMB by OSPs – follow-up actions

By note of 18 June 2021 (Ares(2021)3993731), you were informed of the recommendations of the European Commission Data Protection Supervisor (DPO) and the opinion of the European Data Protection Supervisor (EDPS) concerning the use of functional mailboxes (FMBs) by trade unions and representative organisations (OSPs). Moreover, during the plenary session of the Central Staff Committee on 25 June 2021, the DPO explained the legal framework concerning the sending of emails to staff by OSPs and provided staff representatives with clear replies to their concerns.

On 3 August 2021, OSPs were provided with a draft Code of conduct – foreseen in Article 24 of the Framework Agreement - aimed at reflecting the EDPS opinion and the subsequent DPO recommendations.

By note of the ‘Front Commun’ of 17 September 2021, OSPs opined that the draft Code of conduct strongly restricts freedom of association and goes beyond the recommendations requested by the EDPS and the DPO, in particular in light of the Charter of Fundamental Rights and Belgian Collective Labour Agreement n°5.

On 17 December 2021, a meeting was held between DG HR and all representative OSPs. In the invitation to the meeting, we recalled the opinion of the EDPS and the recommendations of the DPO, indicating that an ‘unsubscribe’ possibility needs to be included in every e-mail messages. We also recalled the requirement to have a privacy statement in place, so that data subjects are appropriately informed of how and why their data are being processed. We attached a model privacy statement to this effect to the invitation. During the meeting, a dedicated IT tool was presented to OSPs by DG CNECT that would help them to comply with the recommendations.

I. EDPS opinion

The EDPS is responsible for monitoring the processing of personal data by the EU institutions, bodies, offices and agencies (EUIs) as well as providing advice on policies and legislation that affect privacy and cooperating with national authorities to ensure consistent data protection. If the EUIs do not comply with data protection rules, the

EDPS can use the corrective and enforcement powers set out in the Regulation (EU) 2018/1725¹ (“EUDPR”).

The EDPS opinion, which also assesses the fundamental rights in question, concludes to the following:

- the Commission has an obligation, under Article 38(2) of the EUDPR, to take all the necessary measures to prevent personal data contained in the directories of staff from being used for direct marketing purposes, i.e. e-mails identified as a promotion of the trade unions and an indirect way to gain more supporters/members.
- the Commission shall adopt a Code of conduct, mentioned in Article 24 of the Framework Agreement without further delay. In that Code, the Commission should clearly set out notably that its authorisation granted to trade unions to use functional mailboxes (“FMB”) provided by the Commissions does not cover direct marketing. The Code should also provide that trade unions must offer a clear possibility to the recipient Commission staff to unsubscribe from trade union’s mailing lists (whatever the type of e-mail), as well as an obligation on the trade unions to ensure that any request in that sense is dealt without undue delay. Additionally, the Code should remind the trade unions of their obligation to properly inform recipient Commission staff about their rights as data subjects, namely to object to processing of their personal data, by means of a transparent and easy to understand privacy statement, including means for unsubscribing easily in every e-mail.

II. Code of conduct: implementing the EDPS opinion and DPO’s recommendations

We have well noted the comments made during the meeting of 17 December 2021 with regard to the project of the Code of Conduct. After consideration of these aspects, we suggest certain changes that can be accommodated. In that perspective, a new version of the draft Code is attached, to be discussed during a follow-up meeting.

Some of the comments made have shown that further discussion may be necessary on certain basic aspects to clear any misunderstandings, especially on the respective obligations of the trade unions and of the Administration. Such discussion can then also explore the means by which the EDPS opinion and DPO recommendations can be put into practice.

Information of the data subject and unsubscribe function – Article 3 of the draft Code

Trade unions process personal data to register memberships, send their members newsletters and information, and, more generally, to easily communicate with their members. Trade unions also process personal data when communicating to staff who are not their members by using internal distribution lists predefined in Outlook normally

¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39–98.

reserved for professional purposes. By default, these distribution lists are to be used by the Commission staff, not by external entities such as the OSPs.

Furthermore, when processing personal data trade unions are bound, pursuant to Article 21(1) of the Regulation (EU) 2016/679² (“GDPR”), to comply with the right of the data subjects (i.e. Commission staff) to object to the processing of their personal data on grounds relating to their personal situation at any time. They should be clearly informed of this right and be provided with an easy way to unsubscribe to any communication from trade unions.

In this regard, it is a settled case-law of the Court of Justice that the data protection legislation must be interpreted in light of the fundamental rights which form an integral part of general principles of law. Thus, the fundamental right to privacy and protection of personal data and different fundamental rights, such as right of association, must be balanced against each other. The regime of the EU data protection legislation provides in itself multiple mechanisms allowing such a balancing to prevent a disproportionate violation of the fundamental rights (see, e.g. Case C-28/08 P, *Commission v Bavarian Lager Co. Ltd*, paragraphs 58-78; Case C-101/01, *Lindqvist*, paragraphs 82-87).

Use of FMB for direct marketing purposes – Articles 1 and 2 of the draft Code

Article 24 of the Framework Agreement foresees that the Commission may authorise trade unions to send e-mails from their FMB to all Commission staff, subject to the good practice set out in a code drafted specifically for that purpose.

When providing information to third entities, the Commission is subject to the EUDPR and, according to Article 38, personal data contained in directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory. Article 38(2) of the EUDPR provides that the institutions shall take all necessary measures to prevent personal data contained in those directories from being used for direct marketing purposes regardless of whether they are accessible to the public or not.

Following the opinion of the EDPS, and in view of respecting this provision, the facility given to trade unions to use FMBs and hence, the directory of users, should not be given when it comes to the communication amounting to direct marketing.

The Code of Conduct must therefore differentiate the e-mails for which the use of the FMB is granted, i.e. communications to defend the interests of the staff, from those considered as ‘direct marketing’.

‘Direct marketing’ is not defined by the Regulations. Yet, the Belgian Authority for data protection issued its [recommendation 01/2020](#) and proposes a very broad definition.

For the purpose of trade unions’ e-mails and in view of taking into account their specific nature, such ‘direct marketing’ may only refer to what is not directly in the professional interest of the staff and not directly linked to the statutory position of the staff, such as the promotion of goodwill actions.

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, p. 1–88.

Moreover, a specific distinction could be made between emails offering advantages only to members (training, insurance, lawyers, etc.) and e-mails intended for all of the staff, members or not. When reaching “non-members”, offers for services should not be linked to any requirement of membership. In any case, as recalled above, all e-mails should include a link to the privacy statement along with the possibility to unsubscribe.

Compliance mechanism – Article 5 of the draft Code

In the event of failure to comply with the obligations laid down in the Code of Conduct, the representative trade union or professional organisation (or its components) shall be notified, in order to provide observations. Where appropriate, and after consulting the HR DPC and the DPO for its opinion, the Director-General of DG HR, shall suspend, for a defined period, the internal functional mailbox made available to the representative trade union or professional organisations (or their components) which have not complied with the provisions of the code, in order to ensure compliance with the above obligations. In the absence of proof of compliance by the deadline indicated, the functional mailbox shall be deleted.

III. IT tool and support from the Administration

It is not for the Code of Conduct to foresee a specific IT tool for trade unions in order to facilitate the unsubscribe function when using the Commission directory of users through the FMBs. Indeed, the unsubscribe function shall be implemented by trade unions by using a method of drawing up mailing lists, which is compliant with the GDPR and ensure a sufficient level of protection of the rights and freedoms of the data subjects.

Yet, DG HR reached out internally within the Commission for a corporate tool, which could facilitate the management of trade unions’ communication, and alleviate the cumbersomeness of the management of distribution lists. Following this, DG CNECT presented during the meeting held on 17 December 2021 with trade unions the “Newsroom” tool, which appears to be particularly suitable. Trainings will also be available to OSPs to use this tool, if needed. Following the first presentation given during said meeting, trade unions are encouraged to reach out to DG CNECT to expose their needs and assess the practicability of the tool.

Ewoud SAKKERS
Head of Unit

c.c.: Mr. Roques, Mr Demirdjiev, Mr Duluc, Ms Lekan, Ms Forgeois (HR.E)
Mr Kroeger, Ms Morana (SG-DPO)